

Meeting Minutes

Public Body Procurement Workgroup

Meeting # 5

Monday, September 19, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

<http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

The Public Body Procurement Workgroup (the Workgroup) met in-person in conference rooms C, D, and E in the James Monroe Building in Richmond, Virginia, with Sandra Gill, Deputy Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Ms. Gill, followed by presentations, discussion, and public comment. Materials presented at the meeting are available through the [Workgroup's website](#).

Workgroup members and representatives present at the meeting included Sandra Gill (Department of General Services), Matthew James (Department of Small Business and Supplier Diversity), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Jason Saunders (Department of Planning and Budget), , John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Andrea Peeks, (House Appropriations Committee), Adam Rosatelli (Senate Finance and Appropriations Committee) and Joanne Frye (Division of Legislative Services). Elizabeth Dooley with the Virginia Association of Governmental Procurement was absent.

I. Call to Order; Remarks by Chair

Sandra Gill, Deputy Director
Department of General Services

Ms. Gill called the meeting to order and informed the Workgroup that today it will receive public comment and finalize its recommendations on SB 575 and SB 550. She noted that the draft language of the final recommendations for SB 575 and SB 550 was shared with the Workgroup and members of the public for their review in advance of today's meeting. She requested that stakeholders who have already provided public comment to the Workgroup at previous meetings limit their comments to any new information that they wish to share with the Workgroup.

II. Approval of Meeting Minutes from the August 31, 2022 Workgroup Meeting

Mr. Heslinga made a motion to approve the meeting minutes from the August 11, 2022 meeting of the Workgroup. The motion was seconded by Mr. James and unanimously approved by the Workgroup.

III. Public Comment on Draft Recommendations for SB 575

Ms. Gill invited stakeholders to provide public comment on the draft recommendations for SB 575. There was no public comment.

IV. Finalize Recommendations on SB 575

Draft of Final Recommendation for SB 575

The Workgroup finds that it is not appropriate at this time to require DGS and all other state agencies to use a TCO calculator for medium-duty and heavy-duty vehicles, but the Workgroup recommends that the General Assembly consider directing VDOT, DRPT, and other state agencies to (i) investigate and determine the appropriate factors that need to be included in a TCO calculator for medium-duty and heavy-duty vehicles and (ii) determine when it may be appropriate to implement a requirement that state agencies use a TCO calculator for medium-duty and heavy-duty vehicles.

Next, Ms. Gill asked the Workgroup for their comments on the draft version of the Workgroup’s final recommendation for SB 575. Mr. McHugh asked whether the Workgroup had intended to use the term “TCO calculations” instead of “TCO calculator” in the final recommendation. Mr. Heslinga noted that SB 575 uses the term “calculator.” Ms. Gill echoed Mr. Heslinga’s comment and stated that for consistency she recommends sticking with the term “calculator” in the final recommendation. The rest of the Workgroup members indicated their agreement with Ms. Gill’s recommendation. Mr. McHugh then also indicated his agreement. There was no further discussion on the draft version of the final recommendation for SB 575.

Mr. Heslinga then made a motion for the Workgroup approve the final recommendation on SB 575. The motion was seconded by Ms. Pride. The motion carried by a vote of 5-0-1.¹

V. Public Comment on Draft Recommendations for SB 550

Ms. Gill then invited stakeholders to provide public comment on the draft recommendations for SB 550. There was no public comment.

¹ Yes: Mr. McHugh, Ms. Pride, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

VI. Finalize Recommendations on SB 550

Draft of Final Recommendations for SB 550

I. AMENDMENTS PERTAINING TO ALL OF SB 550

Recommendation #1:

The Workgroup recommends that the General Assembly consider making the definitions of “construction/construction contract,” “contractor/general contractor,” and “subcontractor” that are applicable to SB 550’s payment liability and timing provisions pertaining to public contracts in § 2.2-4354 and to SB 550’s payment liability and timing provisions pertaining to private contracts in § 11-4.6 uniform.

Recommendation #2:

The Workgroup recommends that the General Assembly consider clarifying whether contracts for professional services, including architectural or professional engineering services, should be included within the scope of SB 550’s payment liability and timing provisions.

Recommendation #3:

The Workgroup recommends that the General Assembly consider making the following language in SB 550 uniform in order to enhance the clarity and consistency of the bill:

Lines 12-13: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Lines 57-58: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Lines 72-73: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

Recommendation #4:

The Workgroup recommends that the General Assembly consider making the following language in SB 550 uniform where appropriate and intended in order to enhance the clarity and consistency of the bill:

Lines 14-16: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the

contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Lines 59-62: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Lines 74-78: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

Recommendation #5:

The Workgroup recommends that the General Assembly consider establishing a timeline for when the notice of withholding payment must be given.

II. AMENDMENTS PERTAINING TO § 2.2-4354 – PUBLIC CONTRACTS

Recommendation #6:

The Workgroup recommends that the General Assembly consider reconciling the provisions added by SB 550 in subdivision 1 of § 2.2-4354 with the existing provisions of the Prompt Payment Act that were moved to subsection 2 of § 2.2-4354 and, in doing so, consider clarifying (i) the type of contracts to which each subdivision applies, (ii) how the “entire amount owed” language in subdivision 1 is intended to interact with the “proportionate share” language in subdivision 2, (iii) that the “entire amount owed” language in subdivision 1 is not intended to affect the VPPA’s retainage provisions, and (iv) when a general contractor must pay a subcontractor when the general contractor has not been paid by the public body.

III. AMENDMENTS PERTAINING TO § 11-4.6 – PRIVATE CONTRACTS

Recommendation #7:

The Workgroup recommends that the General Assembly consider updating the catchline of § 11-4.6 to reflect both the provisions of § 11-4.6 that existed prior to the amendments made by SB 550 and that are still in effect (dealing with the liability of a

contractor for the wages of a subcontractor's employees) and the new provisions added by SB 550 (dealing with payment liability and timing between private owners, general contractors, and subcontractors).

Recommendation #8:

The Workgroup recommends that the General Assembly consider amending the subsection and subdivision lettering in § 11-4.6 to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing in order to make § 11-4.6 easier to interpret.

Recommendation #9:

The Workgroup recommends that the General Assembly consider clarifying that the provisions of subsection C of § 11-4.6 applies only to construction contracts.

Recommendation #10:

The Workgroup recommends that the General Assembly consider (i) reconciling the inconsistency between the timelines for payment that are set out on lines 55-57 in subsection B of § 11-4.6 for owners and on lines 69-70 in subsection C of § 11-4.6 for general contractors and (ii) reconciling such inconsistency by using the "receipt of invoice" language used on lines 55-57 in subsection B as the trigger for payment in both subsections.

Recommendation #11:

The Workgroup recommends that the General Assembly consider clarifying the inconsistent and confusing terminology used in subsection C of § 11-4.6 by amending it (i) to use only the terms "general contractor" and "subcontractor" (similar to § 2.2-4354 in the VPPA dealing with public contracts) and (ii) by inserting the following language from § 2.2-4354 in the VPPA that would make the provisions of subsection C apply throughout all of the tiers: Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

Next, Ms. Gill asked the Workgroup for their comments on the draft versions of the Workgroup's final recommendations for SB 550. There was no discussion by the Workgroup.

Mr. Heslinga then made a motion for the Workgroup approve all of the final recommendations on SB 550. The motion was seconded by Ms. James. The motion carried by a vote of 5-0-1.²

² Yes: Mr. McHugh, Ms. Pride, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

VII. Introduction of Study of SB 272 – Review and recommend policies related to the climate impact of concrete

Ms. Gill shared with the Workgroup that its next study will be of SB 272 from the 2022 Regular Session of the General Assembly. She noted that the bill was introduced by Senator Hashmi. She informed the Workgroup that it will take this bill up for study at a future meeting.

VIII. Public Comment

There was no public comment.

IX. Discussion

There was no further discussion among the Workgroup members.

X. Adjournment

Ms. Gill adjourned the meeting at 9:41 a.m. and noted that the Workgroup's staff will send drafts of the final reports for SB 575 and SB 550 to the Workgroup's members for their review prior to submitting them to the General Assembly by their December 1, 2022 due dates.

For more information, see the [Workgroup's website](#) or contact that Workgroup's staff at pwg@dgs.virginia.gov.
